

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

JAMES ALLEN LEE, #860879	§	
VS.	§	CIVIL ACTION NO. 6:06cv125
DIRECTOR, TDCJ-CID	§	

ORDER OF DISMISSAL

The above-entitled and numbered civil action was heretofore referred to United States Magistrate Judge Judith K. Guthrie, who issued a Report and Recommendation concluding that the petition for a writ of habeas corpus should be dismissed as time-barred. The Petitioner has filed objections.

The Report of the Magistrate Judge, which contains her proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration, and having made a *de novo* review of the objections raised by the Petitioner to the Report, the Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct and the objections of the Petitioner are without merit.

The Petitioner was sentenced on January 21, 1999. His convictions were affirmed on May 31, 2000. He did not file a petition for discretionary review, and his convictions were final on June 30, 2000. The present petition was due no later than June 30, 2001. It was not filed until February 17, 2006. He did not begin any collateral challenges in state court until 2004, which was already too late to trigger any tolling provisions under 28 U.S.C. § 2244(d)(2). The Petitioner filed his first application for a writ of habeas corpus on August 27, 2004, which led the Texas Court of Criminal Appeals to grant him leave to file an out-of-time petition for discretionary review on January 26, 2005. His actual petition for discretionary review was denied on July 27, 2005. The Petitioner argued that his convictions should not have been considered final under state law until September

15, 2005. The deadline for the present lawsuit to be filed, however, is governed by federal law, as opposed to state law. The Petitioner's arguments are foreclosed by the Fifth Circuit's decision in *Salinas v. Dretke*, 354 F.3d 425 (5th Cir. 2004). In construing federal law, the Fifth Circuit held that the granting of leave to file an out-of-time petition for discretionary review was part of the state habeas review process and it did not restart the time clock for the statute of limitations. *Id.* at 431. The present petition was time-barred as of June 30, 2001. Therefore the Court hereby adopts the findings and conclusions of the Magistrate Judge as the findings and conclusions of the Court. It is accordingly

ORDERED that the petition for a writ of habeas corpus is **DENIED** and the case is **DISMISSED** with prejudice. All motions by either party not previously ruled on are hereby **DENIED**.

So ORDERED and SIGNED this 10th day of May, 2006.

A handwritten signature in black ink, appearing to read 'Leonard Davis', with a large loop at the end.

LEONARD DAVIS
UNITED STATES DISTRICT JUDGE